

CLAUSE 4.6 WRITTEN REQUEST

1. INTRODUCTION

This written request seeks an exception to the Height of Buildings development standards adopted under clause 4.3 of the *Pittwater Local Environmental Plan 2014* (PLEP 2014) pursuant to the provisions of clause 4.6 Exceptions to Development Standards.

As shown in **Figure 1**, the land is labelled as 'K' with an identified maximum building height of 10.5 metres. The site is also identified as being within Area 6, which refers to clause 4.3(10) of the Pittwater LEP 2014, requiring the proposal not to exceed 8.5 metres at the street frontage.

Figure 1 – Height of Buildings Map (site outlined in red)



Source: PLEP 2014

2. PROPOSED DEVELOPMENT

This development application seeks approval for the construction of a two to three storey residential aged care facility (RACF), containing:

- 130 sole occupancy, high care rooms;
- Theatre room, gymnasium, activities rooms, salon, office and administrations areas;
- Six dining areas, a number of lounge rooms/breakout areas and a large roof deck overlooking Narrabeen Creek; and
- A basement car parking for 66 vehicles.

Whilst the building ranges from two to three storeys, the building will have a perceivable height of two storeys when viewed from the streetscape. The stepped design of the building has been design to reflect the topography of the site and utilise the views to the Narrabeen Creek corridor.

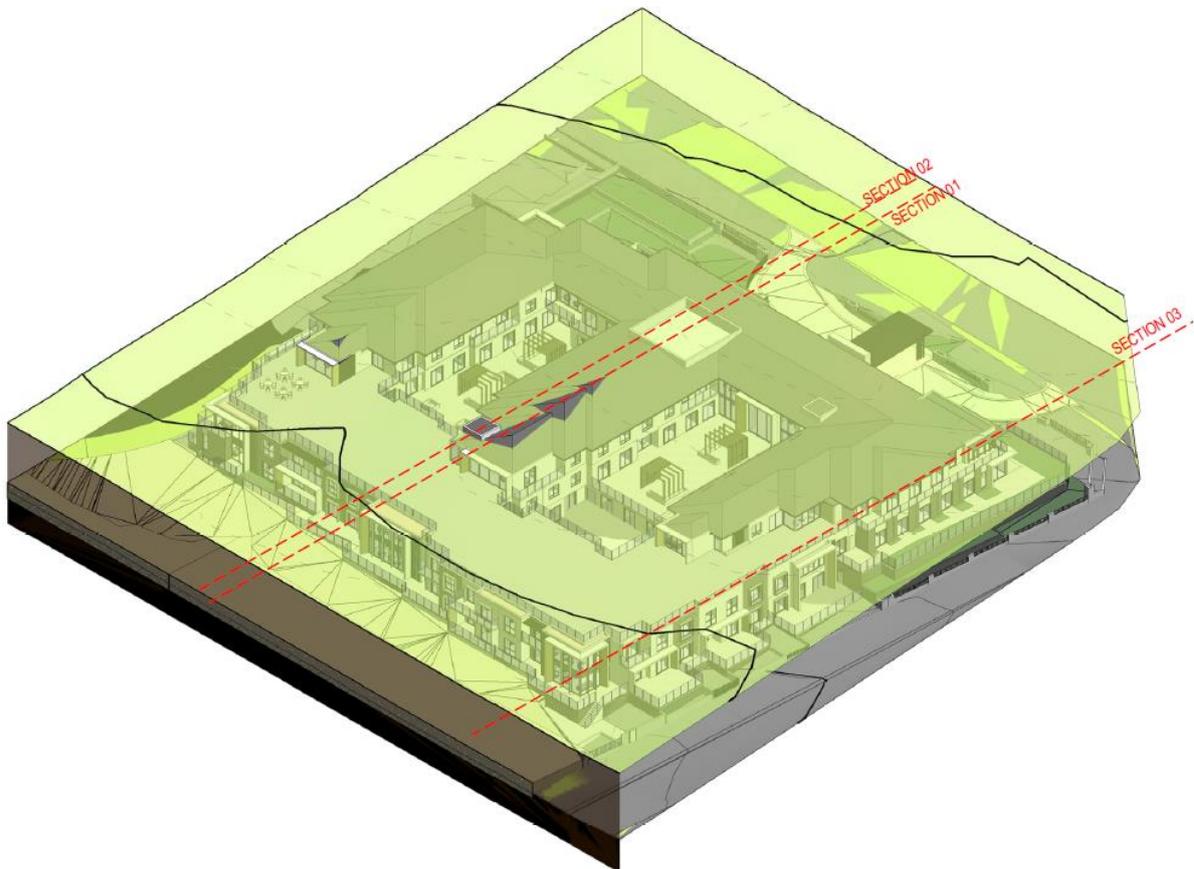
In addition to the RACF, this application also proposes the removal of 11 trees and 18 exempt/weed species, and the construction of an extension of Lorikeet Grove through to the intersection of Warriewood Road and Hill Street.

The residual land to the north of the RACF will be subject to a future application for a residential development.

3. PROPOSED VARIATION TO DEVELOPMENT STANDARD

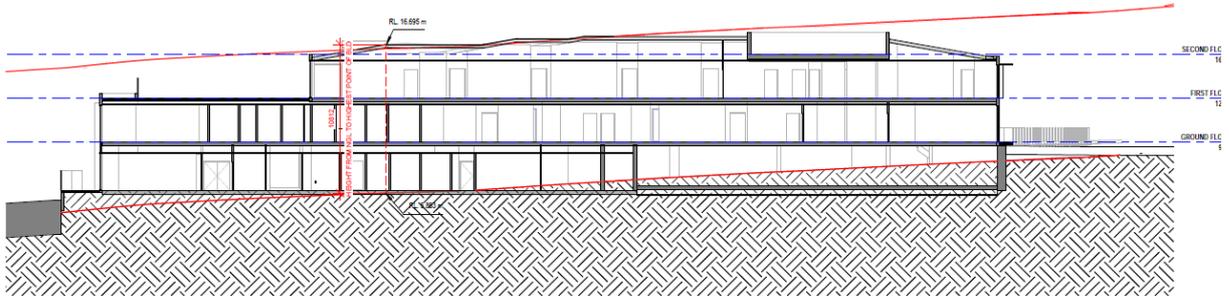
The application seeks to vary the height of building development standards to accommodate the proposed development. The extent of where the proposal would exceed the maximum height of building plane across the site, and the 8.5 metre street wall height, is shown in the figures below. The numerical breakdown of the height controls and proposed height is provided in **Table 1**.

Figure 2 – Areas of exceedance of the height plane



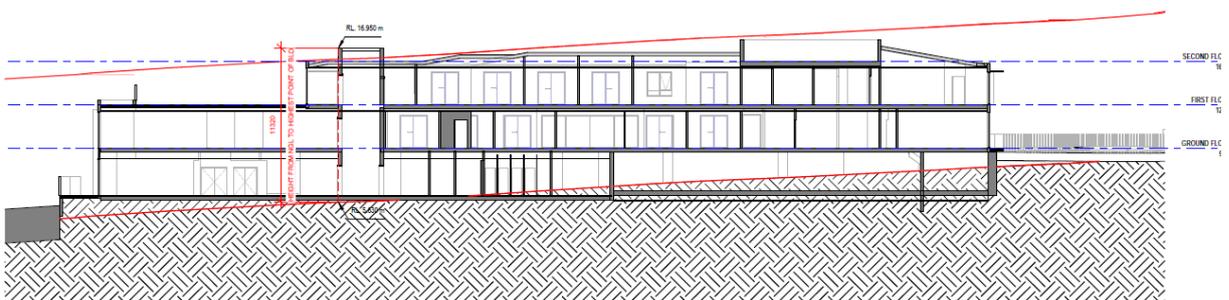
Source: V-Arc

Figure 3 – Section 1 – Roof pitch exceedance



Source: V-Arc

Figure 4 – Section 2 – Lift overrun exceedance



Source: V-Arc

Figure 5 – Section 3 – Street wall height exceedance



Source: V-Arc

Table 1 – Summary of Height Controls

Element/Clause	Development Standard	Proposed Development
Height of building – CI4.3(2)	10.5 metres	11.32 metres
Street frontage height – CI4.3(2F)	8.5 metres	8.75 metres

As indicated above, the proposed non-compliances are limited to a small area of the proposed pitched room and lift overrun located in the centre of the site, and a small length of approximately 4.5 metres of the southern elevation.

Clause 4.6 of the PLEP 2014 permits departures from development standards in certain circumstances. In this case, it is necessary to consider if compliance with the development standard is consistent with the aims of the policy and, in particular, does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

The aims and objectives of Clause 4.6 are as follows:

- (a) *To provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) *To achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Under Clause 4.6(3) and (4) of the PLEP 2014, consent for a development that contravenes a development standard must not be granted unless the consent authority is satisfied that:

- (3)(a) *Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;*
- (3)(b) *There are sufficient environmental planning grounds to justify contravening the development standard; and*
- (4)(a)(ii) *The proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.*

These matters, along with case law judgements from the NSW Land and Environment Court, are addressed below.

4. NSW LAND AND ENVIRONMENT COURT CASE LAW

Several key Land and Environment Court (NSW LEC) judgements have refined the manner in which variations to development standards are required to be approached. The key findings and directions of each of these matters are outlined in the following discussion.

Winten v North Sydney Council [2001] NSWLEC 46

The decision of Justice Lloyd in *Winten v North Sydney Council* established the basis on which the former Department of Planning and Infrastructure's Guidelines for varying development standards was formulated. Initially this applied to *State Environmental Planning Policy – Development Standards* (SEPP 1) and was subsequently updated to address Clause 4.6 of the *Standard Instrument templates*.

The principles for assessment and determination of applications to vary development standards are relevant and include the following five questions:

1. Is the planning control in question a development standard?
2. What is the underlying objective or purpose of the standard?
3. Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act?
4. Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case (and is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case)?
5. Is the objection well founded?

Wehbe V Pittwater [2007] NSW LEC 827

The decision of Justice Preston in *Wehbe V Pittwater [2007] NSW LEC 827* expanded on the findings in *Winten v North Sydney Council* and established the five (5) part test to determine whether compliance with a development standard is unreasonable or unnecessary considering the following questions:

1. Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives;
2. Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;
3. Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;
4. Has Council by its own actions, abandoned or destroyed the development standard, by granting consents that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or
5. Is the "zoning of particular land" unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently compliance with that development standard is unnecessary and unreasonable.

Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC

More recently in the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

1. Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP; and
2. That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);
3. That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs.

Bates Smart Pty Ltd v Council of the City of Sydney [2014] NSWLEC 1001

In *Bates Smart Pty Ltd v Council of the City of Sydney*, Commissioner Brown outlined that *Clause 4.6 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development:*

1. *The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)),*
2. *The second precondition requires the Court to be satisfied that the proposed development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(4)(a)(ii)),*
3. *The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a)) and cl 4.6(4)(a)(i)), and*
4. *The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).*

5. PLANNING ASSESSMENT FRAMEWORK

The following section addresses the local provisions of Clause 4.6 of PLEP 2014, together with principles of *Winten v North Sydney Council* as expanded by the five part test established by *Wehbe V Pittwater* and refined by the judgement of *Four2Five Pty Ltd v Ashfield Council*.

Is the planning control in question a development standard?

The planning control in question is Clause 4.3 of of the PLEP 2014. The planning control, as a numerical control, is a development standard capable of being varied under the provisions of Clause 4.6 of the PLEP 2014.

What is the underlying objective or purpose of the standard?

The objectives for the development standard provided at Subclause 4.3(1) are set out in **Table 2** below with an assessment of the proposal's consistency provided:

Table 2 – Height of Buildings Objectives

Objective	Assessment
<i>(a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality</i>	The desired character for the area is development which ranges in height from two to three storeys, with a two storey street wall fronting Warriewood Road and Macpherson Street. Despite the minor numerical non-compliance, the proposal is in accordance with this desired built form character.
<i>(b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development</i>	The proposal will be in accordance with the established, and anticipated future, built form character of nearby areas. While there is a minor numerical non-compliance, this is a result of the topography of the site and will not be perceivable from the streetscape.
<i>(c) to minimise any overshadowing of neighbouring properties</i>	The proposed development would not overshadow any adjoining properties, with all shadows cast falling either on the subject site or road reserves.
<i>(d) to allow for the reasonable sharing of views</i>	The proposed building heights will not impact on any significant views from surrounding properties.
<i>(e) to encourage buildings that are designed to respond sensitively to the natural topography</i>	The stepped built form of the proposal responds to the topography of the site. However, due to the nature of RACFs requiring level floor plates, generally with long corridors to allow sight lines between nursing stations, there is a minor non-compliance. The height exceedance will not be perceivable from the public domain.

Objective	Assessment
<i>(f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items</i>	The proposal will provide a high quality and visually appealing building to the Warriewood Valley setting. The proposal will have a positive impact on the natural environment, by rehabilitating the creekline corridor, and will not impact on any heritage items or conservation areas.

Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act?

The objectives of the R3 Medium Density Zone are as follows:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provides facilities or services to meet the day to day needs of residents.*
- *To provide for a limited range of other land uses of a low intensity and scale, compatible with surrounding land uses.*

The proposed development is considered to meet the objectives of the R3 zone by facilitating the delivery of a variety of housing options in the area, particularly assisting in meeting the housing needs of the aging population.

The objects in Section 5(a)(i) and (ii) of the Environmental Planning and Assessment Act 1979 are as follows:

- (a) *to encourage*
 - (i) *the proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,*
 - (ii) *the promotion and co-ordination of the orderly and economic use and development of land...*

The development is generally consistent with the objects of the Act, in respect to the following:

- The delivery of increased capacity for seniors living within a central location close to medical services and transport and with Pittwater LGA, which has a high proportion of the population over 65.
- The proposal will not result in significant of unreasonable environmental impacts.

- The development is appropriate for the site and location, as well as being consistent with the objects of the R3 Medium Density Residential zone.

Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Compliance with the development standard is considered unnecessary in this circumstance based on the following reasons:

- The proposal is consistent with the objectives of the development standard as provided in Clause 4.3 of the PLEP 2014 (refer to discussion in section above).
- The proposed development has been designed to respond to the topography of the site through its stepped design. However, the minor non-compliances are due to the nature of RACFs requiring level floors with long corridors to provide sight lines between nursing stations.
- The exceedance of the maximum height of building is limited to a small area of the roof pitch. The development could achieve strict compliance with the maximum height of building development standard with a flat roof. However, the pitched roof design is considered to be more attractive from the streetscape and surrounding properties.
- The proposal is consistent with the objective of the street wall height control by providing a two storey perceivable height from the streetscape.
- The non-compliance will not result in additional floor space across the site.

Taking into account the above, the particular circumstances of this application warrant a variation of the development standard.

Is the development standard a performance based control?

No, the development standard is not a performance based control.

Are there sufficient environmental planning grounds to justify contravening the development standard?

The minor non-compliances are primarily due to the nature of RACFs requiring level floors with long corridors to provide sight lines between nursing stations. While the development steps down with the topography of the site, there are minor exceedances within the centre of the site at the roof ridge and lift overrun, as well as a small length of the southern elevation.

Notwithstanding the minor numerical non-compliance, the proposal meets the desired character for the area by providing two-and-three storey scale development, with two storey street frontages provided adjacent to Warriewood Road and Macpherson Street and the interface with the low-density residences on the eastern side of Warriewood Road.

The areas of the site exceeding the height controls will not cause any additional overshadowing to surrounding properties, or any public recreation areas or open space.

Is the objection well founded?

The proposed development does not result in any unreasonable or significant adverse environmental (social, economic or environmental) impacts. The technical non-compliance will not result in additional yield, and complies with the FSR development standard.

The development would:

- Not create any additional overshadowing to adjoining properties;
- Complies with the objectives of the zone and development standard;
- Aid in providing a diversity of housing options to the area;

Would non-compliance raise any matter of significance for State or Regional Planning?

The non-compliance will not raise any matter of State or Regional Significance.

Is there a public benefit of maintaining the planning control standard?

The proposed development is not contrary to the public interest accordingly there can be no quantifiable or perceived public benefit in maintaining the standard.

6. CONCLUSION

The development exceeds the overall permissible building height by 0.82 metres at the highest point of the building and maximum street wall height requirement by 0.25 metres. The proposed variation to building height is minor and is a result of articulated architectural roof features, the proposed lift overrun, and the topography of the site. The minor non-compliances are primarily due to the nature of RACFs requiring level floors with long corridors to provide sight lines between nursing stations.

A development strictly complying with the numerical standard would not significantly improve the amenity of the surround land uses or streetscape. In the context of the locality, it would be unreasonable for strict compliance to be enforced, as the additional height is compatible with the land use zoning and is setback from Warriewood Road and Macpherson Street.

Based on the reasons outlined above, it is concluded that the request is well founded as strict compliance with the standard is both unnecessary and unreasonable in this circumstance.